(22,922.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 846.

AHA & COUNCIL BLUFFS STREET RAILWAY COMPANY AND OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, APPELLANTS,

vs.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES.

APPEAL FROM THE UNITED STATES COMMERCE COURT.

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a United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

UNITED STATES OF AMERICA, *ss:*

Be it remembered that on the 7th day of February, 1910, came the petitioners in the above entitled cause, by their solicitor, and filed in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, their certain bill of Complaint, in the words and figures following, to wit:

Bill of Complaint.

1 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and Omaha & Council Bluffs Railway & Bridge Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States Within and for the District of Nebraska:

1. Humbly complaining, your orators, Omaha & Council Bluffs Street Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, and Omaha & Council Bluffs Railway & Bridge Company, a corporation organized and existing under and by virtue of the laws of the State of Iowa, avers the Interstate Commerce Commission, hereinafter made defendant hereto, has been created and established and during all the times hereinafter mentioned, has existed under
2 and by virtue of an act of Congress of the United States entitled "An Act to Regulate Commerce," approved February 4, 1887, and the acts amendatory thereof and supplemental thereto.

2. Your orators further aver that the Omaha & Council Bluffs Railway & Bridge Company is the owner of street railway lines in the city of Council Bluffs in the State of Iowa, and of a street railway line extending on and over a bridge across the Missouri river at a point between the City of Council Bluffs and the City of Omaha, and has its principal offices in the City of Council Bluffs in the State of Iowa, but is not engaged in the operation of its said street

railway lines, but that the same are operated by the Omaha & Council Bluffs Street Railway Company as hereinafter more fully appears.

3. Your orators further aver that Omaha & Council Bluffs Street Railway Company owns and operates all of the street railway lines in the City of Omaha and in the adjacent municipalities of Florence, Benson, Dundee and South Omaha, and all of which are operated as connecting lines and under one system, and has its principal place of business and principal operating offices in the City of Omaha, in the District and State of Nebraska. That your orator, Omaha & Council Bluffs Street Railway Company, also operates, as lessee, all of the street railway lines of Omaha & Council Bluffs Railway & Bridge Company.

4. Your orators further aver that the matter in controversy herein is one arising under the laws of the United States, to-wit: under "An Act to Regulate Commerce," approved February 4, 1887, and the Acts amendatory thereof and supplemental thereto, and that the value of the same in controversy herein exceeds the sum of $2,000, exclusive of interest and costs.

3 5. Your orators further aver that in a proceeding lately pending before the Interstate Commerce Commission in which the West End Improvement Club (a voluntary association of persons) was plaintiff and your orators were defendants, it was charged among other things that the Omaha & Council Bluffs Street Railway Company, as lessee of Omaha & Council Bluffs Railway & Bridge Company, was charging ten cents (10c.) for a single fare between Council Bluffs in the State of Iowa and the City of Omaha in the State of Nebraska, and that said fare so charged was unreasonable and unjust, and praying that your orators be required "to make and fix maximum passenger fares to apply in future to the transportation of passengers from Council Bluffs to Omaha, and the reverse, which shall not exceed five cents (5c.) per passenger, or such charge as the Commission shall find reasonable and just."

6. Your orator, Omaha & Council Bluffs Railway & Bridge Company in its answer to said complaint among other things averred that it was a street railway company and not a commercial railroad and "is not a railroad within the meaning of and is not subject to the provisions of the Acts to Regulate Commerce, approved February 4, 1887, and the Acts amendatory thereof and supplemental thereto, and the rates of fare upon said line of said railroad is not subject to regulation by Interstate Commerce Commission."

Said Omaha & Council Bluffs Railway & Bridge Company in its said answer avers that it was not at the time engaged in the transportation of passengers from Council Bluffs in the State of Iowa to Omaha in the State of Nebraska, but more particularly averred, that its said line of railroad, including the said bridge over the Missouri river between Council Bluffs and Omaha, is being operated by

4 the Omaha & Council Bluffs Street Railway Company, a corporation in the State of Nebraska, under and by virtue of a lease dated December 1, 1902, and that under and by virtue of the terms of said lease, the said Omaha & Council Bluffs Street Railway

Company has the absolute and unlimited control over the said line of said railroad in the complaint described, and receives all fares, rents and revenues derived in the said operation of the said line of electric street railroad, including the said bridge, and the Omaha & Council Bluffs Street Railway Company utilizes its own cars and its own employees in operating the said street railroad. Said answer further averred that the said fare of ten cents (10c.) charged between Council Bluffs, Iowa, and the City of Omaha, Nebraska, was a reasonable fare and denied that the same was unreasonable or unjust.

7. Your orator, Omaha & Council Bluffs Street Railway Company filed its separate answer in said proceeding before the Interstate Commerce Commission, and in said answer among other things averred as follows:

"The defendant company being a street railway company and not a commercial railroad is not a railroad within the meaning of and is not subject to the provisions of the Act to Regulate Commerce, approved February 4, 1887, and acts amendatory thereof, or supplemental thereto, and the rate of fare upon said line of street railroad is not subject to regulation by the Interstate Commerce Commission."

"This defendant for further answer avers that it is a street railway company organized and existing under and by virtue of the laws of the State of Nebraska, providing for the organization and incorporation of street railway companies and as such street railway company, it is the lessee of the lines of street railroad of the Omaha & Council Bluffs Railway & Bridge Company, and of the bridge across the Missouri river owned by the said last named company."

"This defendant for further answer avers that a fare of ten cents from Council Bluffs in the State of Iowa, to the City of Omaha in the State of Nebraska, is a reasonable and not an exorbitant or extortionate charge."

8. Your orators further aver that at the time of and prior to the making of the lease by Omaha & Council Bluffs Railway & Bridge Company to Omaha & Council Bluffs Street Railway Company, (on or about December 1, 1902), the street railway lines of the bridge company terminated at the west end of the said bridge over the Missouri river and on the east boundary line of the City of Omaha, and that there then and there existed an arrangement between the Council Bluffs Company and the Omaha Company, by which the cars of the Council Bluffs Company passed westward on Douglas street to Fourteenth street, south on Fourteenth street to Howard street, east on Howard street to Eleventh street, north on Eleventh street to Douglas street and thence back on Douglas street to the bridge, thereby forming a loop and by means of which the Council Bluffs cars return to and upon the bridge and thence eastward to Council Bluffs. That after the execution of the said lease from the Council Bluffs Company to the Omaha Company, the same manner of operating the cars of the Council Bluffs Company was continued. That passengers going aboard the cars in Council Bluffs could ride from any point in that city and across the bridge over the Missouri river and into the City of Omaha as far as

traversed by the said cars while going upon or around the said loop within the City of Omaha, and all for the single fare of ten cents (10c.). That when passengers from Council Bluffs desired to go to any other point within the City of Omaha, they trans-
6 ferred from the said cars on the Council Bluffs line to the cars of the Omaha line at such point or points where the several lines intersected or connected, and thereupon paid to the Omaha Company for transportation upon its lines in the City of Omaha, or into the adjacent municipalities of Florence, Benson, Dundee or South Omaha, a single flat fare of five cents (5c.) the same as paid by other persons traveling on the said lines of the Omaha Company.

9. That at the time of the filing of the said complaint before the Interstate Commerce Commission, and at the time of the handing down of the order of Interstate Commerce Commission, hereinafter complained of, and up to and including the present time the same manner of operating the cars continues; that is to say, that the cars coming from Council Bluffs pass over the bridge and around the said loop and return across the bridge and back to Council Bluffs, and that passengers from Council Bluffs who desire to travel upon and over the lines of the Omaha Company, leave the cars of the Council Bluffs Company at some intersecting point and enter upon the cars of the Omaha Company which may carry them to their desired point of destination. To this extent the said two lines are operated independently each from the other, as much so as when the two lines were operated by independent companies. There never has been and is not now a continuous travel or continuous operation of cars of either company upon the lines owned by the other company.

10. On the 27th day of November, 1909, the Interstate Commerce Commission handed down its order in the premises in the matter then pending before it and which said order reads as follows:

7 "No. 1004.

WEST END IMPROVEMENT CLUB
v.
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY and OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY.

This case being at issue upon complaint and answers on file and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of February, 1910, from charging, demanding, collecting, or receiving their present fare of 15 cents per passenger for the transportation of passengers from Council Bluffs, Iowa, not including Courtland Beach, Iowa, to points on defendants' lines in Omaha, Nebr., or from points on defendants' lines in Omaha, Nebr., to Council Bluffs, Iowa, not including Courtland Beach, Iowa.

It is further ordered, That the said defendants be, and they are hereby, notified and required to establish on or before the 1st day of February, 1910, and maintain in force thereafter during a period of not less than two years, a charge for the transportation of passengers from any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, to any point on defendants' lines in Omaha, Nebr., or from any point on defendants' lines in Omaha, Nebr., to any point on defendants' lines in Council Bluffs, Iowa, not including Courtland Beach, Iowa, which shall not exceed 10 cents per passenger."

8 11. Your orators further aver that the force and effect of the said order is to require of Omaha & Council Bluffs Street Railway Company, as the owner of the electric street railway lines in the City of Omaha and as lessee of the electric street railway lines of Omaha & Council Bluffs Railway & Bridge Company to accept a passenger at any point in Council Bluffs in the State of Iowa, and carry the said passenger therefrom and to and over the said bridge into the City of Omaha for a single fare of ten cents (10c.), and that, if said passenger desires to be carried to any point upon or along the lines of Omaha & Council Bluffs Street Railway Company within the limits of the City of Omaha, to give to said passenger a transfer ticket which shall enable said passenger after he has left the cars on the Council Bluffs line to enter upon and into some car of the Omaha Company, and to be transported upon the cars of the Omaha Company, and upon any of the lines of the Omaha Company within its corporate limits, without paying any additional compensation therefor. Your orators aver that the force and effect of the said order is to require the Omaha & Council Bluffs Street Railway Company to transport passengers upon its street railway lines which are entirely within the State of Nebraska and without compensation therefor, provided it happens that the said traveler may have been transported from the State of Iowa into the State of Nebraska, upon a car operated upon the lines of Omaha & Council Bluffs Railway & Bridge Company.

12. Your orators further aver that the force and effect of the said order in practical operation produces an inequality and discrimination in favor of the traveler from Council Bluffs as against the traveler who becomes a passenger within the limits of the City of Omaha, and to be transported to any point within the limits of the

9 City of Omaha, in this to-wit: that the Omaha passenger who gets aboard an Omaha car to be transported to any point within the limits of the city pays a single flat fare of five cents (5c), while the passenger from Council Bluffs who has paid his ten cents (10c) fare from Council Bluffs, Iowa, to the City of Omaha, is entitled to go aboard the same car as does the Omaha passenger and upon the same Omaha line, and ride to the same point of destination within the limits of the City of Omaha, without paying any fare whatsoever.

That by reason of the premises the said order of Interstate Commerce Commission is null and void and is beyond the power and authority of the Commission to make the same, in that, it produces

a discrimination as to rates and as between passengers, and further in that it is an attempt to regulate rates which are not Interstate rates, but rates for a transportation which are entirely within the State of Nebraska, in that it requires the Omaha & Council Bluffs Street Railway Company to receive upon its electric cars and street railway lines, which are entirely within the State of Nebraska, passengers, and transport them to any point within the City of Omaha in the State of Nebraska, simply because the said passenger may have come from the State of Iowa, and upon a car operated solely upon a line of street railroad owned by Omaha & Council Bluffs Railway & Bridge Company.

13. Your orator, Omaha & Council Bluffs Street Railway Company avers that it is the only company effected by the said order in that it owns and operates all the electric street railway lines in the City of Omaha and in the adjacent municipalities of Florence, Benson, Dundee and South Omaha, and as lessee of the lines owned by Omaha & Council Bluffs Railway & Bridge Company it operates all of the electric street car lines in the City of Council Bluffs and over and across the bridge between the two cities. And your orator, the Omaha & Council Bluffs Street Railway Company further avers that Interstate Commerce Commission has no jurisdiction over it for the further reason that it is incorporated as an electric street railway company under the laws of the State of Nebraska, and exists only as such electric street railway company, and is engaged in the business of a street railway company and under and by virtue of the constitution of the State of Nebraska, and the laws of the State of Nebraska, it is not a railroad within the meaning of that word as used in the constitution and laws of the State of Nebraska, and is not a railroad within the meaning of that word used in the Interstate Commerce Act.

14. The Constitution of the State of Nebraska adopted in 1875 in Article 11 contains provisions relating to the creation and regulation of "railroad corporations." Section 1 of said Article 11 provides that every "railroad corporation" organized or doing business in the State shall have and maintain a public office in the state for the transaction of business "where transfers of stock shall be made" and shall keep books in which shall be recorded the amount of capital stock subscribed; the names of the stockholders; the shares owned by them respectively; that the directors shall make annual reports to the auditor of public accounts "of the amount received from passengers and freight." Sec. 3 of Art. 11 provides:

"No railroad corporation, or telegraph company, shall consolidate its stock, property, franchises, or earnings in whole or in part, with any other railroad corporation or telegraph company owning a parallel or competing line; and in no case shall any consolidation take place, except upon public notice of at least sixty days, to all stockholders, in such manner as may be provided by law."

Section 4 of Art. 11 provides:

"Railways heretofore constructed, or that may hereafter be constructed in this state are hereby declared public highways, and shall

be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited."

Section 8 of Art. 11 provides:

"No railroad corporation, organized under the laws of any other state, or of the United States, and doing business in this state shall be entitled to exercise the right of eminent domain or have power to acquire the right of way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state."

Each and singular of the sections of said Article 11 of the Constitution of the State of Nebraska apply to commercial railroads engaged in the "transportation of passengers and freight." There is no section of Art. 11 of the Constitution which applies to street railroads.

15. Art. 11*b*. of the Constitution of the State of Nebraska of 1875, under the heading of "Miscellaneous Corporations" provides in Section 2:

"No such general law shall be passed by the legislature granting the right to construct and operate a street railroad within any
12 city, town, or incorporated village, without first requiring the consent of a majority of the electors thereof."

It thus appears that under the State Constitution commercial railroads are organized for the transportation of passengers and freight. Street railroads, in the constitution, are treated under the head of "Miscellaneous Corporations" and the section 2, quoted supra contemplates that they shall only operate lines within Cities, Towns or incorporated Villages and then only upon first having obtained the consent of a majority of the electors thereof.

16. Commercial railroads are incorporated in the State of Nebraska under provisions in Chapter 16 (Chapter 16 Compiled Statutes of Nebraska, 1907, p. 531) for the purpose of the transportation of passengers and freight, and authorized to construct and operate railroads between designated termini from point to point within the state. To the contrary, street railroad companies are incorporated under the miscellaneous corporation act and are limited in their powers to the construction and operation of street railroads for the transportation of passengers alone, and upon and along the streets of a city and within the limits of a city and not then until after the consent of the electors of said city first had and obtained.

17. Sections 73 and 75 of Chap. 16, relating to commercial railroads provide as follows:

"SEC. 73. Any number of persons as aforesaid, associating to form a company for the purpose of constructing a railroad, shall, under their hands, make a certificate, which shall specify as follows: First—The name assumed by such company and by which it shall be known. Second—The names of the places of the termini of said road, and the county or counties through which said road shall pass.

Third—The amount of capital stock necessary to construct
13 such road. Such certificate shall be acknowledged before a notary public, and certified by the clerk of the district court in the same manner as is provided for the conveyance of real estate, and shall be forwarded to the secretary of the state, who shall record and carefully preserve the same in his office; and a copy thereof duly certified by said secretary, under the seal of the state, shall be prima facie evidence of the existence of such corporation."

"SEC. 75. Such corporation shall be authorized and empowered to lay out, locate, construct, furnish, maintain, operate, and enjoy a railroad with single or double tracks, with such side tracks, turnouts, offices, and depots as shall be necessary, between the places of the termini of the said road, commencing at or within, and extending to or into any town, city, or village, named as the termini of said road, and construct branches from the main line to other towns or places within the limits of this state."

From said section quoted supra it is provided that commercial railroads may be operated throughout the state and are not confined in their operation to cities, towns or villages, and by other sections of the statute said commercial railroads are possessed of the power of eminent domain.

18. Street railways are governed by Chap. 72, Art. 7, (Compiled Statutes of Nebraska, 1907, p. 1196.) Section 1 of Art. 7 provides:

"Any number of persons may be associated and incorporated under the general laws of this state providing for the creation of corporations for the purpose of constructing and operating a street railroad within any of the cities of this state, upon procuring the consent of a majority of the electors of any such city as hereinafter provided."

14 By Sec. 2 of said Art. 7, it is provided that the articles of incorporation are to be recorded in the "office of the county clerk" of the county in which the city within which it is proposed to construct and operate such street railroad is situated and "must procure the consent of a majority of the electors of such city as herein provided."

Sec. 3 of Art. 7 requires that "the articles of incorporation must" * * * "name the streets through which said railway is to be constructed." Sec. 4 of Art. 7 provides for the manner of submitting to the electors of the city the question whether consent shall be given to the construction of the said street railroad in said city and provides that the proposition submitted to the electors shall "name the streets through which said railway is to be constructed." Said Sec. 4 contains the following provisions:

"And provided further, That no franchise to construct street railways shall be hereafter granted, nor shall any election be hereafter held to vote upon any proposition to give the consent of the electors of any such city to the construction of any street railway, unless there shall have been filed, at least ten days before such election, a map or plat showing the route and location of the proposed street railway in the county office wherein are kept the record of deeds of real estate and also whether the proposed railway along such route is to be a single or double track."

Sec. 5 of Art. 7 among other things provides:

"But no street railway shall hereafter be constructed, or consent, or authority therefor be given by any city, or its electors, upon, or along any part of any street in any city upon or along which any street railway has been already constructed, and where any other company or party owns any street railway upon any part of such street it is hereby authorized and empowered to consent to the use of any part of its railway by any other company upon such terms as may be agreed upon by them; Provided, That no such use shall be allowed or enjoyed without its consent; Provided further, That no authority to construct street railway on any street of any city in this state under any franchise hereafter granted, or consent of the electors of any such city thereto hereafter given, shall be operative or effective unless the owners of a majority of the feet front on the real property abutting upon the street or streets upon which it shall be proposed to construct any such street railway shall in writing consent thereto, which written consent shall be filed in the office of the city clerk of the city wherein such street is situated before any election to give the consent of the electors of such city shall be called."

Sec. 12 of Art. 7 defines a street railway as follows:

"The word 'street railway,' as used in the foregoing section, shall be construed to embrace all street railroads built and operated for the convenience of passengers along the streets and alleys and public thoroughfares of cities in this state."

There is no provision in Art. 7 of Chap. 72 which authorizes or empowers a street railway company to carry freight, nor which permits it to exercise the power of eminent domain, or to possess any of the other powers possessed and exercised by commercial railroads, nor to build or construct or operate a line elsewhere than upon the streets of a city after consent of the majority of the electors thereof first had and obtained, and none of the provisions in Art. 7, Chap. 72, apply to commercial railroads. There is no provision either in the Nebraska Constitution, nor in the Nebraska Statutes by which commercial railroads and street railroads may form connections each with the other so as to form a continuous transportation of either passengers or freight, and if your orator would attempt so to do it would be in violation of its charter rights, and such act on its part would be subject to prohibition by the City of Omaha. Commercial railroads and street railroads as corporations in their practical operation have at all times in the State of Nebraska been maintained as separate and distinct corporations each from the other, and each having distinct corporate powers.

19. Your orator, Omaha & Council Bluffs Street Railway Company, was incorporated as a street railway company under the general incorporation laws of the State of Nebraska, hereinbefore referred to and is the owner of and engaged in the operation of street railway lines on the streets of the City of Omaha, and upon the streets of the adjacent municipalities of Florence, Benson, Dundee and South Omaha, under rights granted by the electors of said cities as provided for under Sec. 2 of Art. 11*b*. of the Constitution of the

State of Nebraska and under the provisions of Art. 7 of Chap. 72 of the Laws of the State of Nebraska hereinbefore more particularly referred to.

20. Omaha & Council Bluffs Railway & Bridge Company of Iowa was incorporated under the general incorporation laws of the State of Iowa as a street railway company and as such corporation constructed its lines of railway in the City of Council Bluffs, Iowa, as a street railway company under a franchise granted to it by the City of Council Bluffs, and that said company continued to operate its lines as such street railway company until on or about Dec. 1, 1902, when it leased its said street railway lines to your orator, Omaha & Council Bluffs Street Railway Company, as hereinbefore more particularly stated.

17 21. Under the laws of the State of Iowa, a street railway is distinct from a commercial railroad and the terms "railway," "railways" and "railway corporations" as used in the statutes of Iowa do not refer to, or include street railway companies. Such has become, and is the settled law of the State of Iowa, as was adjudicated in the case of Fidelity Loan & Trust Co. v. Harry E. Douglas, 104 Ia., 532, where the court defined the distinction between the two kinds of corporations as follows, p. 536:

"We are of the opinion, however, that the terms 'railway' and 'railways' were used in the chapter of the Code of 1873 referred to, are always intended to designate one or more of the commercial railways,—that is railways designed for the transportation of passengers and freight from place to place within the state, or from state to state, or both, and upon which, as a rule, the transportation is effected by means of trains of cars moved by locomotive engines,—and not railways which are designed chiefly for the carriage of passengers from point to point in a single city or town. And we are of the opinion that the term, 'railway corporations,' as used in that chapter, refers only to corporations which own or operate such commercial railways."

22. Your orators upon information and belief aver that they are not railroads or common carriers within the meaning of the "Act to Regulate Commerce;" that said act by its terms applies to "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control;" that said act defines railroads as follows: "The term railroad as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any

18 corporation operating a railroad, whether owned or operated under a contract, agreement or lease;" that wherever the phrase "common carriers" is used in the said Act it is coupled with the limiting phrase "subject to the provisions of this Act."

From the various provisions in the said Act to Regulate Commerce it appears that the said Act refers to commercial railroads as distinct and separate from street railway companies, and that the term "railroad" as used in the said Act applies to railroad companies that are engaged in transportation of passengers or freight through-

out the various states of the Union, and so constructed, conducted and operated that there may be a transfer of either cars or property from the line or lines of one company to the line or lines of a connecting company which is impracticable and impossible as between your orators as street railway companies and the commercial railroads in the said states of Iowa and Nebraska. And by reason of the premises, and as advised by counsel, your orators aver that when the said Act to Regulate Commerce was passed by Congress, and at the time of the enactment of the amendments thereto, it was understood that the said Act to Regulate Commerce was not intended to apply, and did not apply to street railway companies such as your orators. That by reason of the premises aforesaid, your orators aver upon advise of counsel, that the Interstate Commerce Commission did not have jurisdiction over your orators or either of them to make the said order herein complained of, and that the said order is null and void.

23. Your orators further aver that if the said order of the Interstate Commerce Commission is allowed to become and remain effective it will produce a large reduction in the revenue of your orators, and particularly to your orator, Omaha & Council Bluffs Street Railway Company, in that it will be compelled to transport passengers over its street railway lines in the City of Omaha without any compensation whatsoever, provided said passengers shall first have come over the street railway lines from Council Bluffs, in the State of Iowa, and that such reduction of revenues to your orator will exceed the sum of $20,000.00 per year.

Your orators further aver that if the Omaha & Council Bluffs Street Railway Company should refuse to obey the said order of the Interstate Commerce Commission and should refuse to grant transfers to, or to transport in its cars over its street railway lines in the City of Omaha, and without compensation, passengers arriving on the street railway lines from Council Bluffs, that many suits would be brought against each of your orators by many persons claiming to be entitled under the order of the Interstate Commerce Commission, to be so transported over the street railway lines in the City of Omaha, whereby your orators, and each of them, would be subjected to a multiplicity of suits and great loss and damage will be inflicted upon your orators and each of them, all of which acts and doings will greatly injure and embarrass your orators, and each of them, in the transaction of their business.

Your orators further allege that, notwithstanding the facts aforesaid, the said Interstate Commerce Commission maintains and intends to maintain and will, unless the same is enjoined or suspended by the order of this Honorable Court, maintain the said order as an effective order; and institute or suffer to be instituted the judicial proceedings aforesaid, which acts and doings are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators.

24. In tender consideration whereof, and for as much as your orators are remediless in the premises at and by the strict rules of the common law and are only relievable in a court of equity where

matters of this nature are properly cognizable and relievable. Your orators, therefore, pray that upon the filing of this bill a temporary or interlocutory order be entered herein, suspending the said order of the said Interstate Commerce Commission and restraining the enforcement of the said order of the said Commission and restraining the said Commission from taking any steps or instituting any proceedings to enforce the said order, and that upon a final hearing of this cause a decree be entered herein, setting aside and annulling the said order of the said Interstate Commerce Commission and perpetually enjoining the said defendant and its members, their agents, servants and representatives from enforcing said order and from taking any steps or instituting any proceedings for the enforcement of the said order.

Your orators further pray that if any delay intervenes between the filing of this bill and the issuance of a temporary or interlocutory order as prayed for herein, an order be issued herein suspending the said order of the said Interstate Commerce Commission and enjoining the enforcement thereof until the hearing and final determination of the application for the temporary or interlocutory order prayed for herein.

And your orators further pray that such other and further relief be granted in the premises as justice and equity may require and as to your Honors may seem meet.

And your orators further pray that your Honors grant
21 unto your orators a writ of subpœna of the United States of America directed to the said Interstate Commerce Commission commanding it at a certain day and under a certain penalty therein to be specified personally to be and appear before your Honors in this Honorable Court and then and there full, true and complete answer make to all and singular the premises, but not under oath (an answer under oath being hereby expressly waived), and to stand to and abide by such order and decree herein as to your Honors shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray, etc.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY AND
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By JOHN LEE WEBSTER,
Solicitor for Complainants.

STATE OF NEBRASKA,
County of Douglas, ss:

Frank T. Hamilton, being first duly sworn, deposes on oath and says that he is the Vice-President of Omaha & Council Bluffs Street Railway Company, one of the complainants herein; that he has read the said bill of complaint and knows the contents thereof, and that the facts therein stated are true, and that the allegations of conclusions and matters stated upon information and advice of counsel are true as this affiant verily believes.

FRANK T. HAMILTON,
Vice-President.

Subscribed in my presence and sworn to before me this, the 5th day of February, 1910.

[NOTARIAL SEAL.] MARIE R. RACKLEY,
Notary Public.

22 And afterwards, to wit, on the 14th day of February, 1910, there was filed in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain certificate of the Attorney General of the United States, in the words and figures following, to wit:

Certificate of the Attorney General.

23 In the Circuit Court of the United States for the District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY
v.
INTERSTATE COMMERCE COMMISSION.

To the clerk or said court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway and Bridge Company against the Interstate Commerce Commission, under the act of Congress entitled "An Act to regulate commerce," approved February 4, 1887, as amended, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the Act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of February 4, 1887, entitled 'An Act to regulate commerce' " approved February 11, 1903, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges of the Eighth Circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the Circuit Judges of said circuit as is provided by the said Act of February 11, 1903.

GEO. W. WICKERSHAM,
Attorney General.

Washington, D. C., February 8, 1910.

24 And afterwards, to wit, on the 26th day of February, 1910, came the petitioners in the above entitled cause, by their solicitor, and filed in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, a certain notice, in the words and figures following, to wit:

Notice of Hearing for Temporary Injunction.

25 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Notice of Hearing for Temporary Injunction.

To Interstate Commerce Commission:

You are hereby notified that the complainants in the above entitled cause will apply to the Judges of the United States Circuit Court at Federal Court House, St. Louis, Missouri, on the 12th day of February, 1910, at the hour of ten o'clock A. M., or as soon thereafter as the parties can be heard for the granting of a temporary order of injunction to enjoin the enforcement of an order made by the Interstate Commerce Commission on the 27th day of November, 1909, in a matter then pending before the Interstate Commerce Commission, in which West End Improvement Club was plaintiff and Omaha & Council Bluffs Railway and Bridge Company and Omaha & Council Bluffs Street Railway Company were defendants. A copy of the petition for said injunction is handed you herewith.

Dated this the 7th day of February, 1910.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY AND
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By JOHN LEE WEBSTER,
Solicitor for Complainants.

Service foregoing accepted February 7, 1910.
EDW. A. MOSELEY
Sec'y Interstate Com. Commission.

26 And on the same day, to wit, the 26th day of February, 1910, there was filed and entered in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain order, in the words and figures following, to wit:

Order Setting Cause for Hearing.

27 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

An Order.

This matter coming on to be heard on the application of the complainants for a temporary injunction, and it appearing that due notice with the copy of the complaint was served upon the Interstate Commerce Commission on the 7th day of February, 1910, fixing the time for hearing February 12, 1910, at the Federal Court rooms in the city of St. Louis, and:

Whereas, the Attorney General of the United States has filed a certificate as provided for in Section 16 of the Act to Regulate Commerce, and:

Whereas, the attendance of three (3) Circuit Judges to hear the application for an injunction can not be had until the 1st day of March, 1910.

It is therefore ordered that this matter be continued and set for hearing on the 1st day of March, 1910, in the Federal Court rooms in the city of St. Louis.

WALTER H. SANBORN,
Circuit Judge.

February 12, 1910.

28 And afterwards, to wit, on the 3d day of March, 1910, there was filed and entered in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain appearance, in the words and figures following, to wit:

Appearance of P. J. Farrell.

29 In the Circuit Court of the United States for the District of Nebraska.

THE OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

v.

INTERSTATE COMMERCE COMMISSION, Defendant.

To the Clerk of said Court:

Please enter my appearance as solicitor for the Interstate Commerce Commission, the defendant in the above entitled cause.

P. J. FARRELL,
Solicitor for the Interstate Commerce Commission, Defendant.

30 In the Circuit Court of the United States Within and for the District of Nebraska, Omaha Division.

"Thursday Morning.

OMAHA, NEBRASKA, *March Third*, 1910.

No. 241, "Y."

THE OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Appearance.

Now on this 3d day of March, 1910, comes P. J. Farrell, and enters his appearance as solicitor for the Interstate Commerce Commission, the defendant in the above entitled cause.

P. J. FARRELL,
Solicitor for the Interstate Commerce Commission, Defendant."

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of said Court hereby certify the above and foregoing to be a true and correct copy of the entry of appearance in the order book as the same appears of record in my office.

Witness my hand and the seal of said court at Omaha, this 14th day of February, A. D. 1911.

[Seal of the United States Circuit Court.]

GEO. H. THUMMEL, *Clerk.*

31 And on the same day, to wit, the 3d day of March, 1910, came the respondent Interstate Commerce Commission, by its solicitor, and filed in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, its certain demurrer and answer to the bill of complaint, in the words and figures following, to wit:

Demurrer and Answer of Interstate Commerce Commission.

32 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and Omaha & Council Bluffs Railway & Bridge Company, Complainants,

v.

INTERSTATE COMMERCE COMMISSION, Defendant.

Demurrer and Answer of the Interstate Commerce Commission Above-named Defendant, to the Bill of Complaint of the Above-named Complainants.

I.

Demurrer.

The Interstate Commerce Commission, the defendant in the above-entitled suit, by protestation, not confessing or acknowledging any of the matters or things in paragraphs 1 to 9, inclusive, and paragraphs 11 to 24, inclusive, or in any of said paragraphs, in the bill of complaint of the above-named complainants contained to be true in such manner and form as the same are therein set forth and alleged, demurs to said paragraphs of said bill and the allegations contained in said paragraphs. And for cause of demurrer shows—

33 I.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown any equity existing in said complainants.

II.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that said complainants are entitled to the relief or any of the relief asked for by them in and by said bill.

III.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that the legislative department of the United States Government is or ever has been without power to grant the authority exercised by this defendant in making the order set forth in said complainants' said bill.

IV.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said para-

graphs or any of such allegations, shown that said legislative department did not duly confer upon this defendant the authority exercised by this defendant in making said order.

34 V.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that the subject-matter of said order is not within the jurisdiction conferred upon this defendant by said legislative department.

VI.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that in making said order this defendant exercised authority in excess of the authority conferred upon it by said legislative department.

VII.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that in making said order this defendant exercised unlawfully the authority or any of the authority conferred upon it by said legislative department.

VIII.

That said complainants have not, in and by said paragraphs or any of them or in and by the allegations contained in said paragraphs or any of such allegations, shown that in making said order this defendant violated any constitutional or other right of
35 said complainants, over which this court has or may exercise jurisdiction.

Wherefore and for divers other good causes of demurrer appearing in and by said paragraphs, this defendant demurs thereto and prays the judgment of this honorable court whether defendant shall be compelled to make any answer to the said paragraphs or any of them or to the allegations contained in said paragraphs or any of such allegations.

(2.)

Answer.

And this defendant, the Interstate Commerce Commission, not waiving the said several demurrers, but wholly relying and insisting thereon, for answer to paragraph 10 of said bill says:

This defendant admits that on November 27, 1909, this defendant made and entered an order as stated by said complainants in paragraph 10 of their said bill, and admits that said order was in words and figures substantially as set forth by said complainants in said

paragraph 10. In this connection this defendant alleges that on said November 27, this defendant made and filed a report containing its findings of fact and conclusions thereon; that said order was based upon said report, including said findings of fact and said conclusions, and that said report was and is referred to in said order and made a part thereof by this defendant. A copy of said report, marked "Exhibit A," is hereto attached and hereby made a part of this answer.

36 This defendant denies that said complainants are entitled to the relief or any of the relief prayed for by them in their said bill, and this defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

INTERSTATE COMMERCE COMMISSION,
By EDWARD A. MOSELEY,
Secretary Thereof, Thereunto Duly Authorized.
FRANCIS S. HOWELL, *United States Attorney;*
P. J. FARRELL,
Special Assistant United States Attorney,
Solicitors for Defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

P. J. FARRELL,
Solicitor for Defendant.

WASHINGTON,
District of Columbia, ss:

Edward A. Moseley, being first duly sworn, says on oath that he is the secretary of the defendant; that he knows the contents of the foregoing demurrer and answer; that the said demurrer is not interposed for delay; and that the matters and things stated in the answer are true to the best of his knowledge and belief.

EDWARD A. MOSELEY.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this 10th day of February, 1910.

[NOTARIAL SEAL.]

H. S. MILSTEAD,
Notary Public.

37 EXHIBIT A.

No. 1004.

WEST END IMPROVEMENT CLUB
v.
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY et al.

Submitted June 5, 1908; Decided November 27, 1909.

Complaint alleges that the 10-cent fare from Council Bluffs to Omaha is unreasonable and that it is unjustly discriminatory, because defendants give longer rides for 5 cents on lines which do not cross the bridge. Defendants allege that they are street railways and not amenable to the terms of the act to regulate commerce, and that to reduce the fares as prayed for would result in a net loss from the operation of the properties; *Held*, That defendants are common carriers, engaged in the Interstate transportation of persons, and, therefore amenable to the terms and jurisdiction of the act; that the record does not disclose justification for making the reduction prayed for, but that it is unreasonable to charge more than 10 cents for a trip between any point on defendant's lines in Council Bluffs and any point on defendant's lines in Omaha.

Walter I. Smith, G. H. Scott, and T. W. Blackburn for complainant.

John Lee Webster and Emmet Tinley for defendants.

Report of the Commission.

CLARK, *Commissioner:*

Complainant is a voluntary improvement association, the membership of which consists of business men of Council Bluffs, Iowa.

The complaint assails as unjust, unreasonable, discriminatory, and preferential the fare of 10 cents per passenger in either direction between the cities of Omaha, Nebr., and Council Bluffs, Iowa, over defendant's bridge crossing the Missouri River, and prays "that no extra charge be made when in the course of interstate transportation passengers are carried over such bridge," and the establishment of a uniform fare of 5 cents per passenger.

The Omaha & Council Bluffs Railway & Bridge Company, hereinafter referred to as the Bridge Company, under authority of
38 an act of Congress (chap. 356, 49th Cong., vol. 24) constructed and owns a railroad, wagon, and foot toll bridge over the Missouri River at Omaha, Nebr., and Council Bluffs, Iowa, and also a railway, which begins at the west end of the bridge, in Omaha, Nebr., and extends eastward to Council Bluffs, Iowa. The Bridge Company also owns the stocks and bonds of the Omaha, Council Bluffs & Suburban Railway Company, a street-railway line

in Council Bluffs. The Omaha & Council Bluffs Street Railway Company, hereinafter referred to as the Street Railway Company, owns and operates all of the street-railway lines in Omaha, Nebr. In January, 1903, the Street Railway Company leased all of the properties of the Bridge Company for a period of years and now operates all the lines of both systems.

The toll for foot passengers crossing the bridge is 5 cents; therefore adding the street railway fare of 5 cents to the bridge toll makes the charge for transportation when a passenger crosses the bridge on the railway.

The single fare is 10 cents; but nontransferable, limited commutation tickets, each entitling the holder to 30 rides, are sold to all persons desiring them for $1.50.

The defendants contend that:

(1) Complainant is not a proper party to maintain this action.

(2) The defendants, being street railway companies and not commercial railroads, are not railroads within the meaning of, and therefore not subject to the provisions of, the act to regulate commerce.

(3) The fare of 10 cents is violative of no provision of the act to regulate commerce.

(1) The decisions of the Commission and the law itself which provides that "no complaint shall be dismissed because of absence of direct damage to complainant" stand for the principle that complainant is entitled to standing as such under the act.

(2) The first section of the act provides that its terms shall apply "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad," and that "the term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad," etc. Counsel for defendant admits that the Bridge Company and Street Railway Company are common carriers engaged in interstate transportation. The contention in this connection is that they are not railroads within the meaning of the law. In brief and argument defendants cite decisions of the courts in which it has been held that street railways are not railroads and that statutes relating to railroads do not include nor apply to street railways unless street railways are specifically mentioned.

39 The decisions which have been cited by defendants, generally speaking, refer to questions of whether or not, where there is a general railroad law and a specific act of the legislature distinctly naming street railways, the general law refers to street railroads; whether a fellow-servant law was applicable to street railways; whether a board of railroad commissioners has jurisdiction over street railroads; whether a statute giving laborers a lien upon railroads also applied to street railways; whether a street railway was a railroad within the meaning of the laws of Indiana regulating crossings.

Unquestionbly many or all of those decisions are eminently sound under the facts then considered. Masillon Bridge Co. v. Cambria

Iron Co., 59 Ohio St., 179, holds that the word "railroad" as used in the statute relating to railroads does not include street railroads, the statutes of the state relating to railroads and to street railroads being separate and distinct. A decision upon such a state of facts can not be controlling here. If there were a federal law specifically applying to street railroads none would contend that the present act to regulate commerce governed street railways. But here the act, recently amended, in plain terms applies to any common carrier engaged in the transportation of persons by railroad from one state to another.

In Fidelity Loan & Trust Co. v. Douglas, 104 Iowa, 532, in which it was held that as used in the laws of that state the word "railroad" does not include "street railroads," the court expressly stated that the interpretation there adopted applies to section 1309 of the code and not to section 2075, which applies "in terms to street-railway corporations." Judge Waterman, dissenting, said in reference to section 1309:

Being remedial in its character, the section should receive a broad and liberal construction. In interpreting such statutes, it is said: "The old law, the mischief, and the remedy must be kept in mind. That which is within the mischief intended to be remedied is considered within the statute, though not within the letter; and that which is not within the mischief is not within the statute, though within the letter." (Citing authorities.) Here the railway mortgage is clearly within the mischief, and just as clearly within the letter of this remedial section. To restrict the statute to a particular class of "mischief makers," rather than apply it to the "mischief," by whomsoever done, is to adopt a narrow and illiberal rule of construction.

In Ohio, by statute, an interurban electric railroad is classed as a street railroad, but in Cincinnati, Lawrenceburg & Aurora Electric Street Railroad Company v. Lohe, 68 Ohio Stat., 101, on an action brought to recover damages for the alleged negligent killing of plaintiff's interstate, it was held:

It seems reasonably clear that while operating the cars of an interurban railroad within a municipality the regulations and powers of a street railroad company are applicable; but when it comes to running cars of such railroads in the open country, upon a track substantially the same as the track of a steam railroad, and at a high rate of speed, it would seem that the same rules as to negligence and contributory negligence should prevail as are applicable to steam railroads.

It has been held that statutes giving certain powers to railroads include street railroads operated by horsepower; that a statute authorizing the consolidation of railroads is applicable to street railroads; that statutes making the proprietors of any "railroad" liable for injuries caused by the negligence of its servants, prohibiting the obstruction of "railroad tracks," and taxing the property of "any railroad company" include street railways; that street railways are within a statute requiring some person on the locomotive to keep a lookout and requiring a whistle to be sounded to prevent accidents,

etc. Many decisions both pro and contra may be cited, but the state of the law is set forth in Elliot on Railroads, section 6:

It is not easy to reconcile all of the decisions and about all that can be said is that the question as to whether a street railway is included in the term "railroad" in any particular case is determined largely by the context or connection in which the term is used.

In Massachusetts Loan & Trust Co. et al. v. Hamilton, 88 Fed. Rep., 588, it is said:

The meaning of the word must always depend upon the context and the legislative intent of the statute in which it is used, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view.

In Malott v. C. & E. St. L. Electric R. Co., 108 Fed. Rep., 313, Judge Grosscup said:

There is nothing in the acts of 1872 and 1889 that restricts railroads therein mentioned to the use of steam as a motive power, or prevents existing steam roads from changing their motive power to that of electricity. There is nothing in these acts that necessarily or fairly excludes its application to electrical roads, as they now exist; indeed these electrical roads, in the speed of their trains, in the distance traveled, and in the capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam roads alone. We can not conceive that these facts, so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purposes of general transportation.

This Commission in Willson v. Rock Creek Ry. Co., 7 I. C. C. Rep., 83, held that a street railway company engaged in transporting suburban passengers between points in the District of Columbia and points in an adjoining state is subject to the provisions of the act, it was there said:

We can not sustain defendant's contention that the act to regulate commerce applies only to the ordinary steam railways by which interstate traffic is mainly carried, and that street surface
41 roads for urban and suburban passenger travel are exempt from its provisions. It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads and their dealings with the public. But the terms of the statute in this regard are broad and general, and it contains no exception indicating a design to exclude from its operation those interstate roads which are constructed upon public highways, to provide the means for local passenger transportation in the streets of towns and cities and their various suburbs. We see no reason to doubt that the authority of this enactment may be invoked for the regulation of carriers like the defendant, if their business is actually interstate, whenever occasion arises for subjecting them to its restraints and requirements.

Since that decision was rendered numerous and important amendments to the act have been enacted. None of those amendments con-

tain any suggestion that is in conflict with the interpretation that had been placed upon the jurisdiction of the act. On the contrary, amendments to section 1 of the act, which will presently be noticed, strengthen and reinforce the view adopted by the Commission. That view must therefore be considered a part of the present act.

In C. & M. Elec. R. R. Co. v. I. C. R. R. Co., 13 I. C. C. Rep., 27, it was stated that—

The act makes no distinction between railroads that are operated by electricity and those that use steam, nor has the Commission thought at any time to make such distinction Both are subject to the act when engaged in interstate transportation and are entitled to equal consideration in any controversy before us. Moreover, progress in the science of electricity and the rapid increase of new devices for its application have led many practical railroad men to think that we may be measurably near its general use as the chief motive power in transportation.

In the instant case it should be remembered that the defendants have the characteristics of an interurban line as well as of a street railway. They operate 136 single-track miles of road; the rails are not all laid in public streets and highways, but for some distance run over private right of way; they operate over the bridge across the Missouri River, and through sparsely settled sections over expensive culverts not conforming to the level of the streets or roads; they carry the United States mail and do not serve the needs of a single city and its suburbs, but of two cities and several towns, villages, and resorts. As was said in Birmingham R. Co. v. Jacobs, 92 Ala., 187, 12 L. R. A., 830:

A railroad * * * running beyond the corporate limits of any city or town and through counties is not and necessarily can not be a street railway, within the meaning of the constitution and the provisions of the code in regard to street railways; and after leaving the city limits, as we have shown, they are no longer street railways subject to municipal regulations, and if not railroads within the meaning of the general law, we may well inquire what kind of railroads are they and by what laws are they governed? Can it be pre-
42 sumed that the legislature intended to provide for the incorporation of a species of railroad companies sui generis, not subject to any law except the common law for common carriers, while the duties and liabilities of all other railroad companies are regulated and controlled by statutory enactments?

So we must determine from the context, scope, and intent of the act to regulate commerce whether or not its provisions are properly applicable to defendant's railways.

In the debates in the Congress the paramount questions discussed were abuses in connection with freight transportation; unjust discrimination, unreasonable rates, etc. But this fact does not furnish an argument for excluding from the provisions of the law common carriers engaged solely in the interstate transportation of passengers. It was stated in the debates that the law was not intended to apply to "street railways." We must, however, assume that the street railways of that day, and not the interurban lines of this day, were in mind when that statement was made. Some of the largest

railroads bear the corporate title "Railway Company." Other roads of identical character and kind use the title "Railroad" or "Railroad Company." The words "railway" and "railroad" are completely synonymous of each other and no significance can be attached to the choice of either name or to the use of either word in a statute, decision, or discussion. The words of the act "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad" indicate that a common carrier engaged in the interstate transportation of either and not necessarily of both is subject thereto. The relative importance of freight and passenger transportation necessarily increased the attention given to the former and minimized the discussion of the latter.

The term "railroad" as defined in the act of 1887 is enlarged by the provisions of the act of 1906 by the addition of the words "and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property." Note the distinction and the comprehensive language: Those "used or necessary" "in the transportation of persons or property" and "in the transportation or delivery of any of said property." A switch, spur, track, or terminal facility used or necessary exclusively in the transportation of persons is as much subject to the act as are "freight depots, yards and grounds," used or necessary "in the transportation or delivery of any of said property."

With general uniformity throughout the act the use of the words "passengers or property" clearly denotes that carriers of either the one or the other or both are subject to its provisions. Certainly the words of the statute are broad and comprehensive enough to
43 include interstate interurban railroads, and there is nothing in the law which indicates an intent to exclude them. No one questions the jurisdiction of the act over interurban lines which enter the streets of the city of Washington and transport persons to and from adjoining states. The street railways which do not extend beyond the limits of the District of Columbia are governed by other laws. Interurban lines are becoming more and more an important factor in the transportation of freight as well as of passengers. It can not be said that the act controls as to the transportation of property but does not apply to the transportation of persons. If interurban lines were to be exempted from the requirements of the act on the ground that they are street railways it would be impossible to so administer the law as to correct the evils and the mischief at which it was aimed.

Defendants' contention that to hold that the terms "common carrier" and "railroad" include street railroads would "lead to many conflicting embarrassments in the construction and application of the act" does not appeal strongly to us. In every broad and general law there are provisions which necessarily and reasonably are not applicable in particular instances. In Malott v. C. & E. St. L. Electric R. Co., supra, it was held that the acts applied "so far, at least, as they are reasonably applicable." Pipe lines are specifically made

common carriers, subject to the provisions of the act to regulate commerce, and yet no one would consider it other than absurd to prohibit a pipe line from giving an interstate free pass for a passenger, or to require it to furnish cars, to publish refrigeration or icing charges, to construct and maintain a switch connection, or to do many of the things which are required of railroads. Similar observations could be made as to express companies, sleeping-car companies, and boat lines engaged under a common control, management, or arrangement with a railroad in the interstate transportation of persons or property. Whether or not a particular provision of the law applies to a particular common carrier subject to the law must be determined from the facts.

Even admitting that in its popular acceptation the word "railroad" usually applies to standard commercial railroads, we think it plainly evident that it was the intent of the Congress to include within the provisions of the act any and all common carriers engaged in interstate carriage by railroad. No provision of the law is repugnant to that thought, and there are no qualifying words which suggest a different conclusion. The great body of strictly street railways are engaged in serving purely local needs, lie wholly within the confines of a single state, and, by the express terms of the statute, are not within our jurisdiction because not engaged in interstate transportation. It would be a narrow, strained, and illiberal construc-
44 tion to hold that designating an interurban railroad a "street railway" was sufficient to excuse such railroad, when engaged in interstate transportation, from the operation of the law. So far as the practices of common carriers of passengers are concerned, interurban railroads might as certainly, to the same extent and in the same manner as any other carrier or railroad, cause the abuses denounced by the law; they might discriminate as unjustly and charge as unreasonable fares as the railroads denominated as commercial. It follows that they are within the "mischief felt and the object and remedy in view." If interstate, they are clearly outside the jurisdiction of the individual state, and where they are "common carriers engaged in the transportation of passengers or property," as specified in the act, we entertain no doubt of their amenability to its provisions.

Defendants argue that for Council Bluffs, a municipality of the state of Iowa, to fix by ordinance or franchise the maximum rate of fare to be charged for a continuous trip from that city to points in the state of Nebraska would be a regulation of interstate commerce and that such an ordinance could have no extraterritorial effect. Granted; but if the contention is correct that defendants are not subject to the act to regulate commerce, the reasonableness of the fares could be determined only by the common law or by Congress. It is not conceivable that Congress intended to leave the great number of interurban railway companies engaged in the interstate transportation of passengers to regulation by the inadequate remedies of the common law.

In this particular case, the charter granted March 3, 1887, to the Bridge Company provides "and Congress reserves the right, at any time, to regulate, by appropriate legislation, the charges for freight

and passengers over said bridge." Section 26 of the amended act provides "that all laws and parts of laws in conflict with the provisions of this act are hereby repealed." The question naturally arises whether this section operates as a repeal of the charter provision.

The general rule of construction is that a general statute will not repeal the provisions of a former one which is special or particular unless there is something in the general law or in the course of legislation upon its subject-matter that makes it manifest that the legislature contemplated and intended a repeal. The law does not favor a repeal by implication, and where it is possible to so construe the statutes as to maintain the integrity of both it must be done. In other words, it is only where there is irreconcilable conflict or repugnancy that the special or particular statute falls under the repealing clause of the general statute. In the Nebraska Freight Rate case, 64 Fed. Rep., 165, and 169 U. S., 466, the circuit court of the
45 United States for the district of Nebraska and the United States Supreme Court held that the state could, until Congress should prescribe the rates to be charged, regulate intrastate rates of a road which had received a charter from the United States in which there was contained a reservation to the United States for fixing rates. See also the Reagan case, 154 U. S., 413.

In Daviess v. Fairbairn, 3 How., 636, the Supreme Court said that if a subsequent statute be not repugnant in all of its provisions to a prior one, yet if the latter statute clearly intends to prescribe the only rule which shall govern it repeals the prior one. The principle that where the regulation of commerce requires a uniform rule the power of Congress is exclusive, but where it requires different rules in different localities the state may legislate, but only in the absence of congressional legislation, is well established. It seems undoubted that the act to regulate commerce was clearly intended by the Congress to prescribe the only rule as to the regulation of interstate rates and that it should and does supersede different rules in prior statutes.

In Texas & Pacific Ry. v. Abilene Cotton Oil Company, 204 U. S., 426, the court said:

Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and that duty, which the statute casts upon that body, of seeing to it that the statutory requirements as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discriminations, and afford, moreover, a ready means by which, through collusive proceedings, wrongs which the statute was intended to remedy could be successfully inflicted.

Here there is no difficulty about so construing the statutes as to preserve the integrity of both. Congress reserves the right to regulate the charges of the Bridge Company by appropriate legislation. Instead of specifically fixing those charges by statute the Congress "by appropriate legislation" delegated that function and authority to the Commission. So that whether or not it be held that techni-

cally the act to regulate commerce repealed the reservation in the act which granted the charter of the Bridge Company, the present jurisdiction of the Commission over the interstate transportation charges of the defendants is clear.

We now come to a consideration of the reasonableness of the fare. The petition attacks the reasonableness of the fare from Omaha to Council Bluffs or from Council Bluffs to Omaha. The local fare in Omaha and in Council Bluffs is 5 cents. From the west end of the bridge the line in Omaha passes westward on Douglas to Fourteenth street, south upon that street to Howard, east to Eleventh,
46 north to Douglas, and eastward back to the bridge. The fare from Council Bluffs to any point on this loop is 10 cents, and the fare from any point on the loop to any other point in Omaha is 5 cents. The fare from any point on the loop, across the bridge and to any point in Council Bluffs (with the exception of Courtland Beach, which, on account of the Missouri River changing its course, is on the west side of the river, but within Council Bluffs), is 10 cents. The reasonableness of the 10-cent fare and the reasonableness of confining it to points on the loop are put in issue in these proceedings.

The complainant contends that the unreasonableness and discriminatory nature of the fare of 10 cents is shown by the fact that for materially greater distances than that from Fourteenth and Farnam streets in Omaha to any point in Council Bluffs, or the reverse, the fare is but 5 cents; that it is only when the bridge is crossed that the 10-cent fare is charged. It is also contended that at other points of crossing of the Missouri or Mississippi rivers, where conditions are similar to those involved in this case, a fare of 10 cents entitles passenger to transfer to any point in either city.

Defendants argue that to reduce the fare to 5 cents would have the effect of abolishing the bridge toll in favor of persons riding in the cars and leave it in force as to the man who elected to walk over the bridge; that along the line from the east bank of the Missouri River to the city of Council Bluffs for a distance of about 3 miles there is a large territory which is but sparsely settled and from which but little revenue is derived; that a reduction of the fare to 5 cents would result in a great reduction of revenue; that notwithstanding the profit for the year 1907 of $49,844.35 on the bridge company's property a reduction of the fare to 5 cents would be disastrous and would result in a net loss of $53,056.55, there being no evidence that a reduction of the fare would be followed by increased travel; that there is greater hazard in the operation of the lines over the bridge than upon the surface; that the commutation tickets are sold on a plan sufficiently liberal to answer the demands of the community; that it is the prevailing custom to charge 10 cents single fare on street-railway lines between cities on the opposite sides of the Mississippi and Missouri rivers, including bridge fare; that the right to charge a 10-cent fare, including the bridge toll, has been recognized by Council Bluffs in the charters granted to the respective street-railway companies whose franchises and lines compose the present lines operated in Council Bluffs by the defendants, and that the fare across the river on railway bridges between Omaha and Council Bluffs is 25 cents.

It appears that prior to leasing the Bridge Company's properties to the Street Railway Company the Bridge Company was operated at a loss, and that it was operated at a loss during the first two
47 years under the lease. Beginning with the year 1905, however, the Bridge Company yielded an annual profit from operation, and that profit increased each year. This is accounted for by economies in management, such as maintenance of one central power house, central shops, one executive organization, etc., and the development of profitable business.

Comparisons are introduced showing the relative conditions of operation, travel, fares, and service in the instant case and at other places where bridge lines connect cities on opposite banks of the Missouri or Mississippi rivers. Statements of defendant's capitalization, earnings, and expenses have also been submitted, which show, on the whole, liberally profitable returns.

The capitalization of the Bridge Company is entirely separate and distinct from that of the Street Railway Company. If the properties were operated separately, neither of them would be expected to charge less than a 5-cent fare. Such combination fare of 10 cents would, doubtless, however, entitle passenger to transportation to or from points in Omaha other than those located upon the loop.

A full hearing has been had in this cause; we have carefully considered the testimony and the record in the case, and we are of the opinion that a reduction of defendants' fare of 10 cents to 5 cents would not be justified, but that limiting the 10-cent fare to points on the loop in Omaha is unjust and unreasonable, and that the fare from Council Bluffs, not including Cortland Beach, to any point on defendants' lines in Omaha or from any point on defendants' lines in Omaha to Council Bluffs, not including Cortland Beach, should not exceed 10 cents for a continuous trip or for a trip upon which passenger conforms to proper and reasonable regulations governing use of transfer tickets if transfer is required.

An order will be entered in accordance with these views.

PROUTY, *Commissioner*, concurring:

In Willson v. Rock Creek Ry. Co., 7 I. C. C. Rep., 83, I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion, but a majority of the Commission thought otherwise in that case, and for the twelve years since we have uniformly adhered to that holding. It seems to me that this should be accepted as the settled law for this body until reversed by a majority of the Commission or disapproved by a court of competent jurisdiction. I therefore concur in the disposition of this case. Knapp, Chairman, and Cockrell, Commissioner, instruct me to say that they also doubt upon the point of jurisdiction, but concur for the reason above stated.

48 CLEMENTS, *Commissioner*, concurring:

While concurring fully in the conclusion of the Commission respecting its jurisdiction of the defendants and the questions involved, and approving the order made against the limitation of the 15-cent fare referred to, I do not feel satisfied that the 10-cent fare

complained of is reasonable and just. Respecting this question it does not appear to me that sufficient investigation has been made for a satisfactory determination of the matter. A valuation of the properties involved would have been greatly helpful, and, in my judgment, should have been made in view of the meager and unsatisfactory showing contained in the record as it stands.

49 And afterwards, to wit, on the 25th day of April, 1910, there was filed and entered in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain order, in the words and figures following, to wit:

Temporary Restraining Order.

50 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Mr. John Lee Webster, for Complainants.
Mr. P. J. Farrell and Mr. Charles A. Goss, for Defendant.

Order.

The motion of the complainants for preliminary injunction was argued by counsel for the respective parties before Sanborn, Hook and Adams, Circuit Judges and

Whereas the complainants are street railway companies engaged in operating street cars for the transportation of passengers on the streets of Omaha & Council Bluffs and are not commercial railroad companies engaged in the general transportation of freight and passengers and the Interstate Commerce Commission by its order dated November 27, 1909, required them to cease demanding or receiving their fares of fifteen cents per passenger for the transportation of passengers from Council Bluffs, not including Courtland Beach, Iowa, to points on complainants' lines in Omaha, Nebraska, or from points on defendants' lines in Omaha, Nebraska, to Council Bluffs, Iowa, not including Courtland Beach, Iowa, and also required them to establish and to maintain for two years a less rate,

51 And whereas, the Judges are of the opinion that the Congress never intended that the act to regulate commerce of February 4, 1887, 24 Stat. Chap. 104, Page 379, 3 U. S. Comp. Stat., Page 3154, or its amendments, 34 Stat., Chap. 3591, Page 584, should apply to, and they are of the opinion that they do not apply to, such street railway companies, that no power has been delegated thereby to the Interstate Commerce Commission to regulate or affect the rates of transportation of such companies and that the order of the Interstate Commerce Commission was beyond its powers and ought not to be enforced during the pendency of this

suit. Louisville & Portland Ry. Co. v. Louisville City Ry. Co., 2 Duv. (63 Ky.) 175, 178; Funk v. St. Paul Ry. Co., 61 Minn. 435, 437, 441; State v. Duluth Gas & Water Co., 76 Minn. 96, 108; Manhattan Trust Company v. Sioux City Cable Ry. Co., 68 Fed. 82, 86; Congressional Record, Vol. 17, Part IV, page 3472; Railroad Commissioners v. Market Street R. R. Co., 132 Cal. 677, 678-9, 682, 683, 64 Pac. 1065; Gyer v. West Philadelphia Ry. Co., 136 Pa. St. 96, 108; State of Kansas v. Grant Cain, 69 Kan. 186, 189, 190; Railroad Company v. Railroad Commissioners, 73 Kan. 168, 169, 173; Sams v. St. Louis, etc., Ry. Co., 174 Mo. 53, 64, 69, 74-77, 81; Thompson-Houston, etc., Co. v. Simon, 20 Ore. 60, 75, 25 Pac. 147, 149; Front Street Cable Ry. Co., v. Johnson, 2 Wash. 112, 25 Pac. 1084, 1085; Riley v. Galveston City R. R. Co., 35 S. W. 826, 827.

It is hereby ordered that the aforesaid order of the Interstate Commerce Commission of date November 27, 1909, be, and the same is hereby, suspended and the Commission, its attorneys, agents and employees are hereby restrained and enjoined from enforcing it until the final decision of this suit or the further order of the court.

This order shall take effect upon the filing with the clerk of this court of a bond in the sum of ten thousand dollars ($10,000.) approved by one of the Judges of this court and conditioned
52 that the complainants will pay any and all damages which result from the making of this order in case the order shall not be sustained.

WALTER H. SANBORN,
WILLIAM C. HOOK,
ELMER B. ADAMS,
U. S. Circuit Judges.

53 And afterwards, to wit, on the 29th day of April, 1910, there was filed and entered in the clerk's office of the United States Circuit Court, District of Nebraska, Omaha Division, in said entitled cause, a certain injunction bond, in the words and figures following, to wit:

Injunction Bond.

54 United States Circuit Court, District of Nebraska.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant.

Injunction Bond.

Whereas, in the above entitled cause a preliminary order of injunction has been granted enjoining the enforcement of an order of the Interstate Commerce Commission, dated November 27, 1909, relating to fares to be charged for transportation of passengers by the complainant street railway companies and which order reads as follows:

"It is hereby ordered that the aforesaid order of the Interstate Commerce Commission of date November 27, 1909, be, and the same is hereby, suspended and the Commission, its attorneys, agents and employees are hereby restrained and enjoined from enforcing it until the final decision of this suit or the further order of the court."

"This order shall take effect upon the filing with the clerk of this court of a bond in the sum of ten thousand dollars ($10,000.) approved by one of the Judges of this court and conditioned that the complainants will pay any and all damages which result from the making of this order in case the order shall not be sustained."

Now, therefore, this undertaking made and entered into this the 27th day of April, 1910, witnesseth that we, Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company, as principals, and we, Gurdon W. Wattles and Frank T. Hamilton, as sureties, do jointly and severally promise and undertake to and with the clerk of the United States Circuit Court, for the District of Nebraska, for the benefit of whom it may concern in the sum of Ten Thousand ($10,000.00) Dollars that Omaha & Council Bluffs Street Railway Company and Omaha & Coun-
55 cil Bluffs Railway & Bridge Company will well and truly pay any and all damages which may result to any person or persons whomsoever by reason of the granting of said order of injunction in the event that said order of injunction shall not be sustained.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY,
By G. W. WATTLES, *President.*
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By J. H. MILLARD, *President.*
G. W. WATTLES, *Surety.*
F. T. HAMILTON, *Surety.*

Dated this the 27th day of April, 1910.

Approved this the 27th day of April, 1910.
WALTER H. SANBORN,
Circuit Judge.

56 In the Circuit Court of the United States Within and for the District of Nebraska, Omaha Division.

No. 241, "Y."

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY
vs.
INTERSTATE COMMERCE COMMISSION.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of said Court hereby certify that the "Filings-Proceedings" hereinafter mentioned is a true and correct

record of all the transactions and proceedings had in the above entitled cause, to-wit:

Date. Month-Day-Year.	Filings-Proceedings.
Feb. 7, 1910.	Filed Bill of Complaint.
" 14, " "	Filed Certificate of Attorney-General—Made 4 certified copies thereof for Circuit Judges.
" 26, " "	Filed Notice of hearing for Temp. Injunction.
" 26, " "	Filed Order of Judge Sanborn fixing date of hearing.
Mch. 3, " "	Filed Præcipe for Appearance of P. J. Farrell as solicitor for defendant.
" 3, " "	Entered appearance of P. J. Farrell in order book.
" 3, " "	Filed Demurrer and Answer of defendant.
April 25, " "	Filed Temporary Restraining Order, signed by Circuit Judges Sanborn, Hook & Adams.
" 29, " "	Filed Injunction Bond.

Witness my hand and the seal of said Court at Omaha, this 28th day of February, A. D. 1911.

[Seal of the United States Circuit Court.]

GEO. H. THUMMEL, *Clerk.*

57 And afterwards, to wit, on the 6th day of March, 1911, the said cause having been transferred to the United States Commerce Court in accordance with Section 6 of the act of Congress approved June 18, 1910, the originals of all papers and a certified transcript of all record entries in the cause or proceeding up to the time of transfer, were filed in the United States Commerce Court.

58 And afterwards, to wit, on the 3d day of April, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order Permitting the United States to Intervene.

59 In the United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY, Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, Respondent.

In said cause the United States moves the Court that it be permitted to intervene and to become a party respondent; and it appearing to the Court that said cause involves public interests, the motion is al-

lowed, and the United States is made a party respondent accordingly, and it is granted thirty days within which to make defense, either by motion or answer, but defense shall be made in such time as not to delay the hearing of the cause.

MARTIN A. KNAPP,
Presiding Judge.

April 3, 1911.

60 And afterwards, to wit, on the 2d day of May, 1911, came the United States, intervener, by its Attorney General, and filed in the clerk's office of the United States Commerce Court, in said entitled cause, its certain motion, in the words and figures following, to wit:

Motion of United States to Dissolve Restraining Order.

61 In the United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
v.
INTERSTATE COMMERCE COMMISSION.

Motion of the United States to Dissolve the Restraining Order and Injunction Heretofore Issued and to Dismiss the Petition.

The Attorney General of the United States of America, in behalf of the United States, Intervener, moves the Court to dissolve the restraining order and injunction heretofore issued in the above entitled cause and to dismiss the petition, upon the following grounds, viz:

(1) It appears from the said petition that the same is insufficient in that it does not set forth any cause of action upon which the Court may grant the relief prayed or to any part of the same.

(2) It appears from the said petition that the said petitioners have not shown that there is any equity in their said petition upon which to grant the relief prayed, or that they are entitled to the relief prayed or to any part of the same.

(3) It appears from the said petition that the said petitioners have not, in and by their said petition, shown that in making its said order the Interstate Commerce Commission acted without its jurisdiction or exceeded any power or authority conferred upon it by the Act to Regulate Commerce.

(4) It appears from the said petition that the said petitioners have not in and by their said petition shown that in making said order the Interstate Commerce Commission violated any right of the petitioners protected by the Constitution of the United States, or any other right of the said petitioners over which this Court may exercise jurisdiction.

62 (5) It appears from the face of the said petition that the same is in other respects, which will be pointed out upon the

hearing of this motion, insufficient to entitle the petitioners to the relief prayed or to any part of the same.

Wherefore, The Intervener prays that its motion be sustained and that the petition be dismissed at the petitioners' cost and for such other and further action as may be appropriate.

GEO. W. WICKERSHAM,
Attorney-General of the United States.

63 And afterwards, to wit, on the 5th day of May, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain appearance, in the words and figures following, to wit:

Appearance of Charles W. Needham.

64 In the United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
v.
INTERSTATE COMMERCE COMMISSION, Respondent.

Appearance.

To Mr. George F. Snyder, Clerk of said Court:

I hereby enter herein my appearance as Attorney for the Interstate Commerce Commission, respondent.

CHAS. W. NEEDHAM,
Attorney for Interstate Commerce Commission.

Dated May 5, 1911.

65 And afterwards, to wit, on the 26th day of May, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order Granting United States Leave to Withdraw Motion, etc.

66 In the United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
v.
INTERSTATE COMMERCE COMMISSION, Respondent.

On motion of the United States, Intervener, by its counsel, in open court made, it is ordered that leave be and the same is hereby given the said intervener to withdraw its motion to dissolve the tem-

porary restraining order and to dismiss the said cause and to adopt the grounds of the demurrer of the Interstate Commerce Commission filed in said cause as the objections of the United States to the sufficiency of Paragraphs 1 to 9, inclusive, and Paragraphs 11 to 24, inclusive, of the said petition; and to adopt the answer of the Interstate Commerce Commission filed in said cause as the answer of the said intervener to Paragraph 10 of the said petition.

MARTIN A. KNAPP,
Presiding Judge.

67 And in the record of the proceedings in the United States Commerce Court for the 26th day of May, 1911, appears the following entry, to wit:

Cause Taken under Advisement.

68 No. 25.

OMAHA & COUNCIL BLUFFS ST. RY. CO. et al., Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, Respondent.

Thereupon, said cause came on for final hearing upon the merits, and the arguments of counsel were concluded; John L. Webster, Esquire, appearing on behalf of the petitioners and Blackburn Esterline, Esquire, on behalf of the United States, and Dr. Charles W. Needham on behalf of the Interstate Commerce Commission. Thereupon said cause was taken under advisement by the Court.

69 And afterwards, to wit, on the 5th day of October, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain opinion, in the words and figures following, to wit:

Opinion.

70 United States Commerce Court, May Session, 1911.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
v.
INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

On Bill and Demurrer.

For opinion and order of the Interstate Commerce Commission, see 17 I. C. C. Rep., 239.

For opinion of Circuit Court granting preliminary injunction, see 179 Fed., 243.

Mr. John Lee Webster, for petitioners.
Mr. Blackburn Esterline, special assistant to the Attorney General, for the United States.
Dr. Charles W. Needham, for Interstate Commerce Commission.

Before Archbald, Hunt, Carland, and Mack, Judges.

71 [OCTOBER, 5, 1911.]

MACK, *Judge:*

The Omaha & Council Bluffs Railway & Bridge Co., hereinafter referred to as the bridge company, an Iowa corporation constructed, under authority of an act of Congress (act Mar. 3, 1887, 24 Stat., c. 356, p. 501), and now owns a joint railroad, wagon, and foot toll bridge over the Missouri River at Omaha, Nebr., and Council Bluffs, Iowa, and also owns a railway, which begins at the west end of the bridge in Omaha, Nebr., and extends eastward across the bridge to Council Bluffs, Iowa. The bridge company also owns the stock and bonds of the Omaha, Council Bluffs & Suburban Railway Co., a street railway line in Council Bluffs. The Omaha & Council Bluffs Street Railway Co., hereinafter referred to as the street railway company, owns and operates all of the street railway lines in Omaha, Nebr., in addition to which, in January, 1903, it leased all of the properties of the bridge company for a period of years, so that it now operates all of the lines of both systems.

Foot passengers pay 5 cents bridge toll; local street car fare in either city is 5 cents; interstate street railway passengers pay no direct bridge toll but a single fare of 10 cents, or $1.50 for 30 commutation tickets, for a ride to or from any point on the line in Council Bluffs, except Courtland Beach, over the bridge from or to any point on the line of the street railway company within the so-called loop in Omaha. Interstate passengers to or from a point in Omaha beyond the loop receive no transfers, but according to the prac-
72 tice sought to be corrected are required to pay an additional local fare of 5 cents. The loop district in Omaha extends westward on Douglas to Fourteenth Street, south upon that street to Howard, east to Eleventh, north to Douglas, and eastward back to the bridge.

On complaint the Interstate Commerce Commission refused to reduce the 10-cent fare to 5 cents, but abolished the loop limitation in Omaha, ordering the bridge and street railway companies not to charge more than 10 cents to or from any point on the line in Omaha from or to Council Bluffs, except Courtland Beach. The report of the commission will be found in 17 Interstate Commerce Commission Reports, 239. A bill was thereupon filed in the Circuit Court of the United States for the District of Nebraska, and a preliminary injunction was granted against the enforcement of this order. (Omaha & C. B. St. Ry. Co. v. I. C. C., 179 Fed., 243.) The case was subsequently transferred to this court and is now up for disposition on a demurrer to the bill, except as to one paragraph, which is answered by adding to the order of the commission its report, thus making the latter a part of the record.

On the oral argument, though not in the briefs, it was suggested, in accordance with the charges of the bill, that the order of the commission, in practically compelling the street railway company to give transfers in Omaha, went both beyond the issues in the case before the commission and beyond its constitutional as well as its
73 statutory powers in that it thereby attempted to regulate the strictly intrastate affairs of the street railway company by an order which had no reference to the transportation over the bridge, but to what should happen after it was complete, compelling the company in effect to render an additional service without compensation. But the complaint before the commission was that the 10-cent fare between Council Bluffs, Iowa, and Omaha, Nebr., was unreasonable and unjust, and it was prayed that the defendants be required to make and fix passenger fares to apply in future to the transportation of passengers from Council Bluffs to Omaha, and the reverse, which should not exceed 5 cents per passenger or such charge as the commission should find reasonable and just. The report recited that the complainant assailed the 10-cent fare between the two cities over the bridge as unreasonable and prayed that "no extra charge be made when in the course of interstate transportation passengers are carried over such bridge," and the establishment of a 5-cent fare.

While the primary object aimed at was the reduction of the 10-cent fare to 5 cents, the prayer for the abolition of all extra charges and the fixing of a reasonable rate for interstate passenger transportation between the two cities fairly included, in our opinion, the elimination of the loop boundary for the 10-cent fare. Moreover, the commission expressly states in the report that "the rea-
74 sonableness of confining it (the 10-cent fare) to points on the loop is put in issue in these proceedings."

The lines from the bridge in Omaha to and through the loop do not constitute a system separate and distinct from those beyond the loop. Both are under the common ownership, control, and operation of the street railway company. Local passengers pay a single fare within the city of Omaha between all points, receiving the necessary transfers at junction points to and from the loop.

The question presented was, therefore, not whether an independent company operating solely in Omaha beyond loop points and exchanging transfers solely for local passengers with an interstate company operating the loop lines could be compelled to give transfers to interstate passengers as well—as to which we intimate no opinion—but whether or not the interstate company, operating all the lines as one system, the parts of which are independently operated only in a physical sense, in that transfers are necessary from and to the loop, could be compelled, without additional compensation, to carry an interstate passenger to a point on its own lines beyond the loop district; in other words, whether 15 cents is or is not a reasonable fare to be paid for the entire interstate journey made on the several lines operated by the street railway company. So stated, the question is obviously one of the reasonableness of interstate passenger rates, and as such clearly within the jurisdic-
75 tion of the commission, if it has any jurisdiction over corporations such as the street railway company.

Complainants do, however, allege—and this brings us to a consideration of the principal and important question in the case—that the Interstate Commerce Commission, under the act, has no jurisdiction over interstate passenger rates charged by a corporation engaged in the business in which the street railway company is engaged here.

The judges of the Circuit Court before whom the case originally came, in granting a preliminary injunction, held that the complainants were street railway companies engaged in operating street cars for passenger transportation, and not commercial railroad companies engaged in the general transportation of freight and passengers, and as such did not come within the class of corporations over whose rates the Interstate Commerce Commission has been granted jurisdiction. The cases cited in support of this view involved the interpretation of various State acts establishing commissions, regulating taxes, providing for joint rates or connections, giving mechanics' liens, abolishing the fellow-servant rule, or in other ways dealing with railroad problems. Under these statutes it was held that in as much as commercial railroads and street railways were classified separately by the legislatures, electric street railways would
76 not be deemed to be embraced within the general term "railroad," as used in such acts. The principal of these cases, which cite the others, are R. R. Commission v. Market Street R. R. Co., 132 Cal., 677 (65 Pac., 1065) and Sams v. St. Louis, etc., Ry. Co., 174 Mo., 53 (73 S. W. Rep., 686). In each of these there was a vigorous dissenting opinion.

No court decision has been found directly involving an interpretation on this point of the Federal act to regulate commerce, although in the Employers' Liability cases (207 U. S., 463, at 497) Mr. Justice (now Chief Justice) White said: "From the first section it is certain that the act extends to every individual or corporation who may be engaged in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridge, wagon lines, carriages, trolley line, etc."

The conclusion of the Interstate Commerce Commission that it has such jurisdiction is supported by its earlier decision in Willson v. Rock Creek Ry. Co. (7 I. C. C. Rep., 83) and by its later decision in Beall v. Washington, Alexandria & Mt. Vernon Ry. Co. (20 I. C. C. Rep., 406). While two commissioners dissented as to the jurisdictional question in the Rock Creek Ry. Co. case in
77 1897, all concurred in the order which is sought to be enjoined in the present case, Prouty, C., speaking as well for Commissioners Knapp and Cockrell as for himself, making the following statement: "In Willson v. Rock Creek Ry. Co. (7 I. C. C. Rep., 83) I expressed the opinion that the act to regulate commerce did not apply to ordinary street railways. I still entertain the same opinion, but a majority of the commission thought otherwise in that case, and for the 12 years since we have uniformly adhered to that holding. It seems to me that this should be accepted

as the settled law for this body until reversed by a majority of the commission or disapproved by a court of competent jurisdiction."

The fact that the opinion of the majority of the commission in the Rock Creek Railway Co. case has been acted on for so many years should compel us to hesitate before adopting an interpretation of the act contrary to that of the commission. On the other hand, the opinion of such experienced judges as granted the preliminary injunction in the present case and the doubts of our colleague, the presiding judge of this court, while chairman of the commission, and of his two associates, necessitate a careful examination of the question in the endeavor to ascertain whether or not, even though certain words literally construed may be held to grant the jurisdiction, a reasonable interpretation of the entire act, in the light
78 of its history and of the evils sought to be remedied and of the later amendments, supports the literal construction; in a word, whether sound interpretation of both the spirit and the letter of the statute sustains the jurisdiction of the commission.

There is no question that Congress could have granted jurisdiction over interstate street railway companies carrying only passengers. Neither is it controverted that, under the act, the commission has jurisdiction over some corporations engaged in interstate transportation of passengers alone, as well as over some corporation engaged in interstate transportation using electricity instead of steam as the motive power. But it is argued that, as the act itself shows, Congress never intended to exercise its power of regulation over all persons or corporations engaged in interstate transportation (having expressly excluded water carriers, for instance, except where operating in direct connection with a railroad under a common arrangement for continuous carriage); that the evils which compelled the intervention of Congress were due to the acts and omissions of the great railroad systems; that street railways in 1887 were ordinarily purely local and municipal, operated mostly by animal power and fully regulated by municipal ordinances; that many of the provisions of the act are entirely inapplicable to street railways; that commercial railroads, operated ordinarily by steam and vested with rights of eminent domain, are generally
79 differentiated in legislation from street railways operated today ordinarily by electricity, generally not endowed with the right of eminent domain, and running usually upon city streets and public highways and not on private property; and that for these, as well as for other reasons, electric interurban passenger street railways are not included within the classes of common carriers over which jurisdiction was granted by sec. 1 of the act. The relevant part of this section as it was in force when these proceedings were begun in the Circuit Court is copied.*

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* SEC. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be

considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent country: Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this act shall include express companies and sleeping car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property.

80 Intermediate between the ordinary urban street railways which, in the case of cities or towns near each other, whether in the same State or not, become State or interstate interurban surface railways carrying only passengers, and the commercial railroads carrying passengers and freight and operated usually by steam, are the so-called interurban electric roads. These have been organized, or at any rate have become important factors in transportation, since 1887. They usually carry mail, express matter, and some freight as well as passengers, and do not only a local business in more than one city and between cities but also between city and country. It is conceded by counsel that corporations operating such roads, even though differing in many respects from so-called commercial railroads, come within the jurisdiction of the commission when engaged in interstate transportation. The commission so held in C. & E. Elec. R. R. Co. v. I. C. R. R. et al. (13 I. C. C. Rep., 20) and C. & C. Traction Co. v. B. & O. S. W. R. R. Co. (20 I. C. C. Rep., 486). In Nebraska and some other States

corporations operating such interurban roads are, moreover, created under the general railroad acts.

The present street railway company differs from this class of interurban roads in that it is created under the street railway act of Nebraska; it does not and is not empowered to carry freight; and, moreover, unlike some interurban roads, it has no right of
81 eminent domain. Like these, however, it carries mail; it serves not one but two cities and several towns, villages, and resorts; and though the bill of complaint alleges that the rails of the street railway company are all on streets and highways, it does not deny the statement in the report of the commission, referring probably to the leased lines of the bridge company, that the rails are not all laid in streets and highways, but for some distance run over private right of way and over the bridge across the Missouri River.

While, as complainant urges, the Nebraska corporation is the only party actually affected by the order, nevertheless the order is directed against it not in relation to its business as a local Nebraska street railway corporation, but to its business as a carrier engaged in interstate transportation. As such carrier it is the successor of the Iowa corporation, the bridge company. Whatever may be the latter's charter limitations as an Iowa corporation, it erected the bridge and the lines thereon (both now leased to and operated by the street railway company) under power granted to it by Congress to construct, operate, and maintain the bridge and a "steam, electric * * * or other line of railway."

Whether or not the street railway company is empowered as a Nebraska corporation to operate the bridge and the Iowa lines is immaterial in this case; it is, rightly or wrongly, engaged in
82 their operation, and it is, therefore, a common carrier engaged in the interstate transportation of passengers by electric railway.

It is likewise immaterial to this inquiry, that the street railway company is created under the street railway and not under the commercial railroad act of Nebraska. If, soundly interpreted, the Federal act gives the commission jurisdiction over such electric railways, State legislation is powerless to limit or to prevent such grant.

Does, then, the lack of statutory power to carry freight and to exercise the right of eminent domain, so differentiate such a corporation as this street railway company from the modern interurban roads, as to exempt it from the jurisdiction of the commission?

Great stress is laid upon a statement by Senator Cullom, chairman of the Senate committee, when the original act of 1887 was under consideration (Cong. Rec., vol. 17, pt. 4, p. 3472), that: "The bill is not intended to affect the stagecoach, the street railway, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects."

But whatever view may have been so expressed, it can not determine the correct interpretation of the act, particularly as it now stands, with all the changes that have been introduced since 1887.

83 If the language be broad enough to include such a corporation as the present street railway company, and there is no contention but that "railroad" may be and frequently is synonymous with or inclusive of "street railways," it is, moreover, immaterial that Congress may not specifically have intended to confer jurisdiction over the few comparatively insignificant interstate horse street railways of 25 years ago.

A statute of the scope of the interstate commerce act, designed to regulate the vast interstate transportation business of the country, is not to be narrowly interpreted—any more than the Constitution—in accordance with the economic or physical conditions prevailing at the time of its adoption. Then, too, the decision in Wabash, St. Louis, etc., Railway Co. v. Illinois (118 U. S., 557), definitely denying to the States the right to fix or regulate interstate rates for passengers, and thereby necessitating some congressional action, is as applicable in its reasoning to interstate street railway rates as to those of commercial railroads. Unless the commission has jurisdiction over those rates they are absolutely uncontrolled.

As noted above, while Congress has expressly excluded water carriers, except when operated in direct connection with a railroad, it has not expressly excluded street railways. Moreover, the act has been several times amended since the Rock Creek Railway Co. case; and not only has Congress thus by its failure to exclude street
84 railways apparently concurred in the construction there given, but by the latest amendment it has, in fact, given its apparent sanction thereto.

In 1910 section 15 of the act was amended to read: "The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character," which is the first specific mention of street electric passenger railways. This proviso, following the grant of power to establish through rates, etc., between railroad carriers, would have been totally unnecessary unless the commission had theretofore had jurisdiction over street electric passenger railways. Congress, therefore, must have enacted the legislation of 1910 upon the assumption that such jurisdiction had been conferred upon the commission by the original act.

The argument that many of the requirements of the act would be impossible of accomplishment by street railways does not impress us, inasmuch as this is at least equally true of sleeping-car companies, pipe lines, telegraph and telephone companies, all of which are expressly covered by the statute. As to each of them only such of its provisions as are applicable will be deemed to refer to such companies, respectively.

85 The frequent repetition of the phrase "passengers or freight" clearly indicates that a carrier of passengers only is as subject to regulation by the commission as is a carrier of both freight and passengers.

Finding substantially nothing either in the language of the statute or in the history of this legislation that indicates an intent to

exclude interstate passenger street railways from its operation, and finding, on the contrary, that the words of the act are broad and comprehensive enough to include them and that some at least of the evils sought to be remedied by this legislation can be corrected only if the commission have such jurisdiction, we are compelled to differ from the views expressed by the Circuit Court in granting the preliminary injunction, and to hold that power has been delegated to the commission to regulate rates of transportation by such companies as the complainants herein, which requires us to sustain the demurrer of the defendants and to dismiss the bill. And it is so ordered.

86 And afterwards, to wit, on the 13th day of October, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

Order Sustaining Demurrer and Dismissing Bill.

87 United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

This cause coming on to be heard on the 26th day of May, A. D. 1911, on Bill filed February 7th, 1910 and on Demurrer and Answer of Interstate Commerce Commission filed the 3d day of March, A. D., 1910, and having been argued by counsel, Mr. John Lee Webster appearing for the Petitioners, Mr. Blackburn Esterline for the United States, and Mr. Charles W. Needham for the Interstate Commerce Commission, and upon due consideration thereof, it is now this 13th day of October, A. D., 1911, ordered, adjudged and decreed that the said above referred to Demurrer of the Respondent be and the same is hereby sustained and that the Bill of Complaint herein be and the same is hereby dismissed.

By the Court:

MARTIN A. KNAPP,
Presiding Judge.

88 And afterwards, to wit, on the 23d day of October, 1911, came the petitioners in said entitled cause, by their solicitor, and filed in the clerk's office of the United States Commerce Court, their certain assignment of errors, in the words and figures following, to wit:

Assignment of Errors.

89 United States Commerce Court.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant, and UNITED STATES, Intervenor.

Assignment of Errors.

Now come Omaha & Council Bluffs Street Railway Company, and Omaha & Council Bluffs Railway & Bridge Company, and make the following assignment of errors to the judgment and order of the court in the above entitled cause:

I.

The court erred in holding that the Interstate Commerce Commission, under the Act to Regulate Commerce, has jurisdiction over Street Railroads and Street Railroad Companies; and whereas the court should have found that the Act to Regulate Commerce does not include Street Railroads and does not confer authority upon the Interstate Commerce Commission to regulate fares or transportation upon Street Railroads.

II.

90 The court erred in holding that the Interstate Commerce Commission had jurisdiction to make its order under date of November 27, 1909, fixing and regulating certain rates of fare upon the plaintiff's street railway lines, between points in the City of Council Bluffs, Iowa, and into and upon the lines of Omaha & Council Bluffs Street Railway Company within the corporate limits of the City of Omaha.

Whereas the court should have held that the order of the Interstate Commerce Commission was void and beyond the scope of its authority in that it requires the Omaha & Council Bluffs Street Railway Company to carry upon its lines within the City of Omaha without compensation, persons who may have paid a fare of ten cents (10¢) to ride from Council Bluffs, Iowa, to Omaha, Nebraska, upon the lines of the Omaha & Council Bluffs Railway & Bridge Company.

III.

The court erred in refusing to grant the injunction prayed for by the plaintiffs, and by its order and decree directing that the plaintiff's bill of complaint be dismissed. Entered under date of Oct. 13, 1911.

JOHN LEE WEBSTER,
Solicitor for Complainants.

91 And on the same day, to wit, the 23d day of October, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain petition for appeal, in the words and figures following, to wit:

Petition for Appeal.

92 United States Commerce Court.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY, and Omaha & Council Bluffs Railway & Bridge Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant, and UNITED STATES, Intervenor.

Petition for Allowance of Appeal.

The Complainants, Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company, in the above entitled cause, feeling aggrieved by the order and decree of the court, entered on the 13 day of October, 1911, in the above entitled cause, pray for an order allowing an appeal from the said order, judgment and decree to the Supreme Court of the United States, and that an order be made fixing the amount of security which the complainants shall be required to furnish as a cost bond upon said appeal.

JOHN LEE WEBSTER,
Solicitor for Complainants.

93 And on the same day, to wit, the 23d day of October, 1911, there was filed and entered in the clerk's office of the United States Commerce Court, in said entitled cause, a certain order, in the words and figures following, to wit:

94 *Order Allowing Appeal.*

It is ordered that the appeal as prayed by the complainants is hereby allowed to the Supreme Court of the United States to review the order and decree hereinbefore entered in said cause and the cost bond is hereby fixed at $500.00.

MARTIN A. KNAPP,
Presiding Judge.

October 23, 1911.

95 And on the same day, to wit, the 23d day of October, 1911, there was filed in the clerk's office of the United States Commerce Court, in said entitled cause, a certain bond, in the words and figures following, to wit:

Appeal Bond.

96 United States Commerce Court.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and Omaha & Council Bluffs Railway & Bridge Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION, Defendant, and UNITED STATES, Intervenor.

Cost Bond on Appeal.

Know all men by these presents that we, Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company, as principals, and Gurdon W. Wattles and F. T. Hamilton as sureties are held and firmly bound unto the Interstate Commerce Commission, and all others concerned, in the sum of Five Hundred Dollars to be paid by the complainants subject to the following conditions:

Whereas the complainants in the above entitled cause have sued out and appeal to the Supreme Court of the United States to reverse the order, decree and judgment entered in the United States Commerce Court in said cause on the 13 day of October, 1911.

Now therefore, the condition of this obligation is such that if the said complainants shall prosecute said appeal to effect, and
97 answer all costs if it fails to make said appeal good, then this obligation shall be void, otherwise to remain in full force and effect.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY,
By G. W. WATTLES, *President.*
OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY,
By J. H. MILLARD, *President.*
GURDON W. WATTLES, *Surety.*
FRANK T. HAMILTON, *Surety.*

Dated this the 23 day of October, 1911.
Approved this the 23d day of October, 1911.

MARTIN A. KNAPP,
Presiding Judge.

98 *Transcript of Docket Entries.*

United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,
vs.
INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

Attorneys:

John Lee Webster, for Petitioners.

James A. Fowler, Blackburn Esterline, for the United States.

Chas. W. Needham, P. J. Farrell, for Interstate Commerce Commission.

Proceedings.

1911.

Mar. 6. All papers filed in U. S. Commerce Court.
Apr. 3. Ordered that United States be permitted to intervene, granted 30 days to make defense.
May 2. Motion of United States to dissolve the restraining order and injunction heretofore issued and to dismiss the petition, filed.
May 5. Appearance of Chas. W. Needham for Interstate Commerce Commission, filed.
May 26. Brief for complainants filed.
May 26. Order granting leave to United States, Intervener, to withdraw motion to dissolve temporary restraining order and dismiss cause, and to adopt demurrer and answer of Interstate Commerce Commission, filed.
May 27. Brief and argument on behalf of the Interstate Commerce Commission, filed.
Oct. 5. Opinion filed.
Oct. 13. Order entered sustaining demurrer and dismissing Bill of Complaint.
Oct. 23. Assignment of errors, filed.
Oct. 23. Petition for allowance of appeal, filed.
Oct. 23. Order allowing appeal, filed.
Oct. 23. Cost bond on appeal, filed.
Oct. 23. Citation on appeal, filed.

99 United States Commerce Court.

No. 25.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY and OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION, Respondent; THE UNITED STATES, Intervening Respondent.

UNITED STATES OF AMERICA, *ss:*

I, G. F. Snyder, clerk of the United States Commerce Court, do hereby certify the above and foregoing (on pages numbered 1 to 98, inclusive) to be a true and complete transcript of the proceedings had of record in the above entitled cause, as the same appear from the original record in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States Commerce Court this 30th day of October, A. D. 1911.

[Seal of the United States Commerce Court.]

G. F. SNYDER, *Clerk.*

25.

100 United States Commerce Court. Filed Oct. 23, 1911. G. F. Snyder, Clerk.

Citation.

The United States of America to Interstate Commerce Commission, Greeting, and United States, Intervenor, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, thirty days from and after the day this Citation bears date, pursuant to an appeal filed in the Clerk's office of the United States Commerce Court, in this suit wherein Omaha & Council Bluffs Street Railway Company and Omaha & Council Bluffs Railway & Bridge Company are appellants, and Interstate Commerce Commission is appellee, to show cause, if any there be, why the judgment, order and decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.